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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, *et al.*,
Petitioners,

v.

LAURA NEZTSOSIE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. PRICE-ANDERSON PROVIDES THE EXCLUSIVE REMEDY FOR CLAIMS ARISING FROM NUCLEAR INCIDENTS AND GIVES DEFENDANTS AN ABSOLUTE RIGHT TO HAVE SUCH CLAIMS DECIDED IN A SINGLE FEDERAL COURT	5
A. Price-Anderson Is One of Many Incentives Offered by the Federal Government To Promote Nuclear Energy	5
B. The Objective of Price-Anderson Is To Compensate the Victims of a Nuclear Incident Quickly and Uniformly, While Limiting the Liability of Contractors and Licensees	8
1. Price-Anderson Makes All Claims Arising From a Nuclear Incident Federal Claims	12
2. Price-Anderson Gives Defendants the Right To Remove All Claims Arising From a Nuclear Incident to United States District Court	14
C. Price-Anderson Preempts State-Law Claims Otherwise Arising From a Nuclear Incident and Necessarily Preempts Any Similar Tribal-Law Claims	15
II. THE FEDERAL REMEDIAL SCHEME IS INCOMPATIBLE WITH TRIBAL COURT ADJUDICATION	17
CONCLUSION	28

TABLE OF AUTHORITIES

Cases	Page
Aquatherm Indus., Inc. v. Florida Power & Light Co., 84 F.3d 1388 (11th Cir. 1996)	27
Arizona Public Serv. Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1995)	25
Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990)	21
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)	17
DeCoteau v. Sentry Ins. Co., 915 F. Supp. 155 (D.N.D 1996)	21
Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994)	25
Enlow v. Moore, 134 F.3d 993 (10th Cir. 1998)	24
FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990)	24
Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981)	27
Hapgood v. City of Warren, 127 F.3d 490 (6th Cir. 1997)	27
Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)	25
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998)	21
Lane v. Central Bank of Alabama, N.A., 756 F.2d 814 (11th Cir. 1985)	27
LaBeau v. Dakota, 815 F. Supp. 1074 (W.D. Mich. 1993)	25
Maine v. Thiboutot, 448 U.S. 1 (1980)	27
Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)	14, 24
Montana v United States, 450 U.S. 544 (1981)	20, 26
Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997)	24
Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997)	15
O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994)	15
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	17

TABLE OF AUTHORITIES—Continued

	Page
Roberts v. Florida Power & Light Co., 146 F.3d 1305 (11th Cir. 1998)	15
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	25
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	10, 15, 16
Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997)	10, 14, 16, 26
Tafflin v. Levitt, 493 U.S. 455 (1990)	27
Tennessee v. Davis, 100 U.S. 257 (1880)	14, 16
In re TMI Litig. Cases Consol. II, 940 F.2d 832 (3d Cir. 1991)	15
United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996)	21
UNC Resources, Inc. v. Benally, 518 F. Supp. 1046 (D. Ariz. 1981)	18
Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980)	16
Weso v. Menominee Indian School Dist., 915 F. Supp. 73 (E.D. Wis. 1995)	21
Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1516 (1998)	23
Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990)	27
Statutes and Regulations	
7 Navajo Nation Code § 354(C)	20
Code of the Winnebago Tribe § 2-111	22
Colville Tribal Code § 4.1.11	22
18 U.S.C. § 1961 *et seq.*	26
25 U.S.C. § 476	18
25 U.S.C. § 3601 *et seq.*	25
28 U.S.C. § 1257	25
28 U.S.C. § 1404	20
28 U.S.C. § 1407	21
28 U.S.C. § 1441	21
28 U.S.C. § 1738	23
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Pub. L. No. 89-645, 80 Stat. 891 (1966)	9, 10

TABLE OF AUTHORITIES—Continued

Page

Pub. L. No. 100-408, 102 Stat. 1076 (1988) 13
25 C.F.R. Part 11 (1998) 17, 18, 19

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H. CONF. REP. No. 103-383, *reprinted in* 1993 U.S.C.C.A.N. 2453 25
H.R. REP. No. 100-104, Part 1 (1987) 12, 13
S. REP. No. 100-218 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476 ..... 8, 11, 12
S. REP. No. 100-70 (1988), *reprinted in* 1988 US.C.C.A.N. 1424 ..... 5, 8, 9
S. REP. No. 1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201 ..... 9, 10

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Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991 (1991) 17
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COMPTROLLER GENERAL OF THE UNITED STATES, CLEANING UP COMMINGLED URANIUM MILL TAILINGS: IS FEDERAL ASSISTANCE NECESSARY? (Feb. 5, 1979) 7
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TABLE OF AUTHORITIES—Continued

Page

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Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 712 (1997) 19
Robert Laurence, *Full Faith and Credit in Tribal Courts*, 28 N.M.L. REV. 19 (1998) 23
Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998) 22
1 OFFICE OF NUCLEAR MATERIAL, UNITED STATES NUCLEAR REGULATORY COMM'N, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON URANIUM MILLING (NUREG-0706) (Sept. 1980) 6
FRANK POMMERSHEIM, BRAID OF FEATHERS (1995) 17
Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113 (1995) 26
Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989) 23
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TABLE OF AUTHORITIES—Continued

	Page
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BRIEF OF *AMICUS CURIAE* NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Mining Association ("Association")[1] is a trade association representing producers of most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses related to mining. The Association's membership includes approximately 70% of the companies in the

[1] No party or its counsel has authored any part of the Association's brief. No person or entity other than the Association and its counsel has made a monetary contribution to the preparation or submission of this brief.

current domestic uranium industry, many of which have or had operations on or near Indian reservations. The principal purpose of the Association is to represent those with interests in the nation's mineral resources industries in the important public policy issues affecting the development and use of mineral resources. To that end, the Association seeks to develop policies that will foster the efficient production, distribution and use of mineral products.

The mining companies in this case are merely examples of many such companies that worked closely with the federal government to create this country's domestic uranium industry and to promote its nuclear energy program in the 1940s, 1950s and 1960s. The decision below, as it stands, may result in a dramatic expansion of tribal court jurisdiction over the activities of non-Indians, including many Association members who worked closely with the federal government in developing nuclear energy. In the United States today, more than 45 different Indian tribes lease out portions of their reservation lands for mining operations. *See* UNITED STATES DEP'T OF THE INTERIOR, MINERAL REVENUES 1997, at 84 (1998). More than 2.1 million acres of Indian lands were under lease for mining purposes in 1997, with revenues exceeding $200 million. *Id.* at 83, 124-25. These mining operations are potentially affected by an expansion of tribal court jurisdiction to include claims based on federal statutes. The Ninth Circuit's rationale is not limited to the Price-Anderson Act, but could be extended to other federal statutes. Nor is the Ninth Circuit's decision limited to current mining operations. The uranium mining at issue here took place 30-40 years ago, but the court of appeals made no effort to determine whether there was any reason for the mining companies to believe that they were subjecting themselves to tribal court jurisdiction when they began—or even when they ceased—operations on the reservations. Other Association members may be

brought into tribal court for long-terminated activities if the Ninth Circuit's decision is allowed to stand.

Counsel for the parties have consented to the filing of this *amicus* brief. Their letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

The district court enjoined the respondents from prosecuting their claims "to the extent that [respondents] seek relief based upon the Price-Anderson Act in tribal court." *El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610, 613 (9th Cir. 1998). The Ninth Circuit, acting *sua sponte*, reversed the injunction because it could find nothing in the Price-Anderson Act, 42 U.S.C. §§ 2012-2014, 2210 ("Price-Anderson"), expressly prohibiting tribal courts from adjudicating Price-Anderson claims. The decision of the court of appeals should be reversed because it seriously undermines Congress' statutory scheme to provide a uniform federal remedy and a federal forum to resolve all claims arising out of a nuclear incident. The federal remedial scheme is wholly incompatible with tribal-court adjudication of such claims.

Price-Anderson is an essential part of a comprehensive federal program to develop and regulate nuclear energy. It provides a comprehensive remedial system to assure public compensation in the event of a nuclear accident and to limit the liability of private participants in the nuclear industry. This limitation of liability was one of several incentives that the federal government provided to encourage private companies to participate with it in developing nuclear energy. The Act establishes procedures for efficient and uniform resolution of all claims resulting from any nuclear incident, including the absolute right of removal to a single federal court. Just as the Atomic Energy Act as a whole preempts any non-federal attempt to regulate nuclear energy, Price-Anderson preempts all other laws in the field it occupies, in keeping with the

overriding congressional intent to provide a uniform federal remedy subject to adjudication in a federal court for all claims resulting from a nuclear incident.

Adjudication of such claims in tribal courts is incompatible with the comprehensive federal regulation of nuclear energy and the federal remedial scheme that applies to all claims arising from nuclear incidents. There are more than 150 tribal courts in operation today, applying different tribal laws in accordance with varying procedures and judicial philosophies. Under the Ninth Circuit's rationale, any of these courts would have jurisdiction to hear and decide Price-Anderson claims. This could produce anomalous results because some courts do not consider themselves bound to apply federal law when it conflicts with tribal law. Thus, there is no guarantee that a tribal court would apply Price-Anderson (and the federal cases interpreting it) to claims arising out of a nuclear incident. Moreover, the defendant sued in tribal court would probably be precluded from removing to federal court. Both the general federal removal statute and Price-Anderson's special removal provision authorize removal only from state courts. At the conclusion of the tribal court proceedings, the defendant would have no certain means of assuring a review on the merits in the federal courts. It is clear that the federal district courts may review a tribal court's *jurisdictional* determination. But it is not at all clear that any appellate mechanism would be available by which the tribal court's decision on the *merits* could be reviewed in federal court. As a result, the federal court system—and ultimately this Court—could lose control over the interpretation and application of an important federal statute and important federal policies.

In summary, tribal court adjudication would frustrate federal regulation of nuclear energy and the three main purposes of the Price-Anderson Act: (1) to create a federal-law remedy that would be consistently applied to all nuclear incidents; (2) to assure a single federal forum

for resolution of the claims; and (3) to assure uniformity in the treatment of all claims—uniformity that can be assured only if all judicial decisions are subject to ultimate review in this Court.

ARGUMENT

I. PRICE-ANDERSON PROVIDES THE EXCLUSIVE REMEDY FOR CLAIMS ARISING FROM NUCLEAR INCIDENTS AND GIVES DEFENDANTS AN ABSOLUTE RIGHT TO HAVE SUCH CLAIMS DECIDED IN A SINGLE FEDERAL COURT

A. Price-Anderson Is One of Many Incentives Offered by the Federal Government To Promote Nuclear Energy

Price-Anderson was enacted in 1957 as section 170 of the Atomic Energy Act of 1954. It was intended "to remove a major deterrent to private participation in the development of nuclear energy" by setting a limit on the liability of private industry in the event of a nuclear accident. S. REP. No. 100-70, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1426. Limiting the liability of persons responsible for nuclear incidents was, Congress found, "in the interest of the general welfare and of the common defense and security." 42 U.S.C. § 2012(i). Price-Anderson, however, was only one of many ways in which Congress attempted to encourage private industry to participate with the federal government in developing nuclear energy. Price-Anderson must be seen in that wider context.

Beginning in 1946, when the Atomic Energy Act was originally passed, the federal government saw an urgent need to discover sources of uranium in the United States and to advance the technology necessary to extract and concentrate uranium from ore. Encouraged, sponsored, licensed and closely regulated by what was then the Atomic Energy Commission ("AEC"), mining companies increased the known mineable reserves of uranium ore in

the United States ninety-fold between 1946 and 1959.[2] Nearly all of these reserves are located in the western United States, on or near Indian reservations.

Because the AEC wanted to purchase uranium concentrate rather than uranium ore, it encouraged mining companies to build and operate government-licensed processing mills. As an incentive, the AEC offered contracts under which the AEC agreed to purchase uranium concentrate at a price that would allow the private company to recover its cost of constructing and operating the processing mill over the life of the contract.[3] The AEC's program to develop a domestic uranium industry reached its peak in 1961, when 27 processing mills were operating. *Id.* In fact, the AEC's program was too successful, producing more uranium than the AEC could use. Because the AEC was effectively the only buyer for uranium at the time,[4] the number of active uranium mills and the quantity of uranium they produced dropped sharply between 1967 and 1970, as the AEC scaled back its purchases. URANIUM MILLING at 2-2.

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2 *See* 1 OFFICE OF NUCLEAR MATERIAL, UNITED STATES NUCLEAR REGULATORY COMM'N, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON URANIUM MILLING (NUREG-1706) at 2-1 - 2-4 (Sept. 1980) (history of uranium milling and status of inactive uranium milling operations) (hereafter "URANIUM MILLING"). Known mineable reserves were 900,000 metric tons in 1946 and 81,000,000 metric tons in 1959. *Id.* at 2-1.

3 *See* HOLGER ALBRETHSEN & FRANK E. MCGINLEY, DOE, SUMMARY HISTORY OF DOMESTIC URANIUM PROCUREMENT UNDER U.S. ATOMIC ENERGY COMM'N CONTRACTS: FINAL REP'T, at 8 (1982) (hereafter "URANIUM PROCUREMENT").

4 Between 1948 and 1970, the AEC purchased about 300,000 metric tons of uranium (U_3O_8), more than half of that (with a value of $3 billion) domestically produced. URANIUM MILLING at 2-1. During most of this period, the federal government was the only buyer for uranium concentrate. The first private sale of uranium concentrate occurred in 1966, under a license from the AEC. URANIUM PROCUREMENT at 5.

The AEC's contracts with uranium-mining and processing companies were exceptionally detailed and comprehensive. They did not, however, include provisions governing disposal of the sand-like radioactive waste (called "mill tailings") produced when the raw uranium was processed, except to specify that the mill tailings should be stockpiled near the plant. At the time, there appeared no reason to do more. Until the mid-1970s—after most uranium mines and mills, including those at issue in this case, had shut down—the AEC concluded from all the available information that the mill tailings were essentially harmless. Because the contracts were supposed to compensate mining companies for their costs, requiring the mining companies to do more would have cost the government more. As the Comptroller General of the United States acknowledged in 1978, mill owners

> acted in good faith in carrying out their responsibilities in meeting contract provisions and Federal regulations. Unfortunately, like the Federal Government, they did not recognize that the tailings were a potential health hazard, and did not provide for their control.

COMPTROLLER GENERAL OF THE UNITED STATES, CLEANING UP COMMINGLED URANIUM MILL TAILINGS: IS FEDERAL ASSISTANCE NECESSARY? at iv (Feb. 5, 1979). The federal government thus had a "strong moral responsibility" to share in the cost of cleaning up the mill tailings that had been "generated under Federal contracts." *Id.* at v.

The waste from uranium mining and processing that allegedly injured the respondents was generated under federal contracts by private companies working closely with the federal government in support of a comprehensive federal program to promote the national interest in nuclear energy. Those private companies were effectively acting as agents of the federal government in furtherance of an important federal policy. They could not have

imagined that their actions on behalf of the federal government and in compliance with federal regulations would expose them to unlimited liability (including punitive damages) under tribal law in a tribal court. Congress intended them to rely—and presumably they did rely—on the federal government to define through regulation the limits of nuclear safety and on the protections offered by Price-Anderson.

B. The Objective of Price-Anderson Is To Compensate the Victims of a Nuclear Incident Quickly and Uniformly, While Limiting the Liability of Contractors and Licensees

Price-Anderson has been amended several times, most substantially in 1988. From the beginning, however, Congress has attempted to strike a balance between two fundamental but conflicting objectives: to compensate those injured by a nuclear accident; and "to set a limit on the liability of private industry to remove a major deterrent to private participation in the development of nuclear energy." S. REP. No. 100-70, at 13.

Price-Anderson was originally designed to provide "a comprehensive, compensation-oriented system of liability insurance for Department of Energy ["DOE"] contractors and Nuclear Regulatory Commission ["NRC"] licensees operating nuclear facilities." S. REP. No. 100-70, at 14. The Price-Anderson "system" has three principal components: (1) a limit on the aggregate liability of DOE contractors and NRC licensees; (2) "channeling of liability" for all damages resulting from a nuclear incident to the DOE contractor or NRC licensee, "even though other parties (such as subcontractors or suppliers) might be liable under conventional tort principles"; and (3) a commitment by the federal government to indemnify DOE contractors and NRC licensees for any liability claims that exceed the amount of financial protection that the contractors and licensees can obtain from private insurers. *Id.* *See* S. REP. No. 100-218, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1477. In short, Congress intended Price-Anderson to provide a "unified and efficient approach to processing and settlement of claims, thus allowing quick compensation to the public from the pool of funds set up by the Price-Anderson system." S. REP. No. 100-70, at 14.

In 1966, Congress amended Price-Anderson to add a provision for consolidating, in a single federal district court, suits resulting from an "extraordinary nuclear occurrence" (one which the NRC judged to involve a "substantial" release of radioactive materials). Pub. L. No. 89-645, 80 Stat. 891 (1966) (amended in 1988). Congress had several reasons for this 1966 amendment that are relevant to the issues now before the Court. In particular, Congress intended the 1966 amendment to "reduce the likelihood of unequal treatment of victims" of a nuclear incident. S. REP. No. 1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201, 3207.

Even in the event of an "extraordinary" nuclear incident, Congress expected that "relatively few claims" would actually be litigated. *Id.* at 3215. Nevertheless, Congress tried to ensure that "a claimant who does feel constrained to take his claim to court should not be subjected to procedural requirements different from those some other claimant might face." *Id.* One victim of a nuclear incident, Congress said, should not "be subject to different substantive and procedural laws than would apply to another victim simply by reason of an invisible State boundary line that separates them." *Id.* at 3208. Congress concluded that an "absolute right of removal" to a single federal court was necessary to assure "more expeditious and uniform treatment of all parties" following a major nuclear incident. *Id.* at 3215.[5]

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[5] As Senate Report 1605 notes, "If the circumstances of the occurrence and the damage actions did not appear to the Commission or to the defendant to necessitate removal to this single Federal court, an action started in a State court or other Federal court

The 1966 amendment made no mention of tribal courts, referring specifically only to removal from "any State court." Pub. L. No. 89-645, 89 Stat. 891, § 3. Permitting tribal courts but not state courts to retain jurisdiction over claims arising from an "extraordinary nuclear occurrence" would, however, have been contrary to the very purpose for providing an "absolute right of removal" to the federal district court in the district where the "extraordinary nuclear occurrence took place." Congress intended to provide for consolidation of "*all suits* arising out of a serious nuclear incident." S. REP. No. 1605, 1966 U.S.C.C.A.N. at 3208 (emphasis added). *Accord id.* at 3215 ("all law suits arising from an 'extraordinary nuclear occurrence' "; "all cases arising from the same set of circumstances"). Congress never intended that claims arising from a nuclear incident could be brought in tribal court.

This Court has made it clear that "[a]s to non-members . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction" unless Congress expressly enlarges tribal-court jurisdiction. *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1413 (1997). Congress did not expressly enlarge tribal-court jurisdiction to hear claims arising from a serious nuclear incident when it amended Price-Anderson in 1966. On the contrary, Congress clearly intended that "the rights of persons who are injured are established by State law." S. REP. No. 1605, 1966 U.S.C.C.A.N. at 3226. In other words, Congress left no room for the Indian tribes to exercise legislative jurisdiction over liability arising from such a nuclear incident. Accordingly, tribal courts could have no adjudicative jurisdiction over such claims.[6]

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could of course proceed to judgment in that court." 1966 U.S.C.C.A.N. at 3215.

[6] Originally, Congress gave the Atomic Energy Commission exclusive jurisdiction to regulate nuclear materials. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-50 (1984). In 1959, Congress amended the Atomic Energy Act to allow a *state* to regulate

The number of claims resulting from the Three Mile Island ("TMI") accident in 1979 demonstrated to Congress that an absolute right of removal to a single federal court was required for claims arising from any nuclear incident. H.R. REP. No. 100-104, pt. I at 18 (1987). Although the TMI accident was not an "extraordinary nuclear occurrence," it "resulted in over 150 separate cases against TMI defendants, with over 3,000 claimants, in various state and Federal courts." S. REP. No. 100-218, at 13. Maintaining these similar cases in multiple jurisdictions was duplicative and inefficient. *Id.* It was an obstacle to "equitable and uniform treatment" of all victims of a nuclear incident. H.R. REP. No. 100-104, at 18. In testimony to Congress, attorneys for both plaintiffs and defendants agreed that consolidating these cases in a single federal court "would greatly benefit the process for determining compensation for claimants." S. REP. No. 100-218, at 13.

To promote prompt and uniform compensation for individuals injured as the result of a nuclear incident, Congress in 1988 amended Price-Anderson in two fundamental ways. *First*, Congress made *all* claims for damages arising from *any* nuclear incident federal claims, and *second*, it gave defendants, the NRC and DOE an absolute right to remove such claims to the federal district court for the district in which the nuclear incident occurred. This right of removal was intended to ensure that in the event of *any* nuclear incident, all claimants would be subject to the same substantive and procedural laws and that all claims would be handled uniformly and ex-

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nuclear byproduct materials and some other nuclear materials *if* the state adopted a suitable regulatory program. *Id.* at 250. Congress continued to preclude states from regulating the more hazardous nuclear materials because, for those materials, "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future." *Id.* (quoting H.R. REP. No. 86-1125, 3 (1959)). Congress gave no regulatory authority over nuclear materials to Indian tribes.

peditiously. H.R. REP. No. 100-104, at 18 ("equitable and uniform treatment of victims"); S. REP. No. 100-218, at 13 (avoiding "the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions").

In 1988, as in 1966, Congress made no reference to tribal courts. Nevertheless, in 1988 (as in 1966) permitting tribal courts to adjudicate claims arising from a nuclear incident—made federal claims in 1988—would have been directly contrary to Congress' intent to ensure that victims of a nuclear incident would be treated uniformly and that liability be determined efficiently.

1. *Price-Anderson Makes All Claims Arising From a Nuclear Incident Federal Claims*

As amended in 1988, Price-Anderson, through a series of interlocking definitions, makes all claims arising from a "nuclear incident" federal claims. Moreover, "nuclear incident" is broadly defined to include both injuries caused by radiation and those caused by the toxic characteristics of mine tailings *other than* radioactivity.

- Price-Anderson defines "public liability action" as "*any* suit asserting public liability" and expressly states that any "public liability action shall be deemed to be an action arising under section 2210 of this title." 42 U.S.C. § 2014(hh) (emphasis added). Thus, a public liability action arises under federal law. Congress intended the 1988 amendments to "satisfy the Article III requirement that federal courts have jurisdiction over cases arising under the Constitution or under the laws of the United States." S. REP. No. 100-218, at 13.[7]

[7] The "substantive rules for decision" in a "public liability action" are "derived from the law of the State in which the nuclear incident involved occurs"—but only to the extent that law is consistent with the provisions of section 2210. The House Report on the amendments specifically noted that Congress had "used this approach in the Outer Continental Shelf Lands Act." H.R. REP. No. 100-104, Part 1, at 18 (1987). The definition of "public liability action" was added in 1988. Price-Anderson Amendments Act of 1988, Pub. L. 100-408, § 11(b). The other, related definitions were already part of Price-Anderson.

- "Public liability," in turn, is "*any* legal liability arising out of or resulting from a nuclear incident or cautionary evacuation" (apart from three exceptions irrelevant here). 42 U.S.C. § 2014(w) (emphasis added).[8]
- "Nuclear incident" means "any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). "Source material" includes uranium and ores containing uranium in significant concentration, § 2014(z); "byproduct material" includes "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content," § 2014(e).

In short, *any* claim based on bodily injury, sickness, disease, death or property damage resulting either from the radioactive or from the other hazardous or toxic properties of uranium, uranium ores, or the tailings and wastes

[8] The three exceptions under section 2014(w) underscore how sweeping Price-Anderson's definition of "public liability" is. The exceptions are "(i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs."

produced by extracting or concentrating uranium from uranium-bearing ores is a federal claim. All the claims at issue in this case—and any similar claims in other future cases—are federal claims. By prescribing that the "substantive rules for decision" in "*any* suit" arising from a nuclear incident "shall be derived from the law of the State in which the nuclear incident occurs" (unless that state law is inconsistent with Price-Anderson), 42 U.S.C. § 2014(hh), Congress made clear that Indian tribes have no jurisdiction to legislate regarding such claims and thus have no jurisdiction to adjudicate *any* claims arising from a nuclear incident. *See Strate*, 117 S. Ct. at 1413.

2. *Price-Anderson Gives Defendants the Right to Remove All Claims Arising From a Nuclear Incident to United States District Court*

Congress amended Price-Anderson in 1988 to provide an absolute right of removal of all "public liability actions" from state court to the United States district court in the district where the underlying "nuclear incident" occurred—or to the United States District Court for the District of Columbia, if the nuclear incident occurred outside the United States. 42 U.S.C. § 2210(n)(2).

Removal serves the critical purpose of promoting uniformity and efficiency. Indeed, uniformity is even more important now that all claims arising from a nuclear incident are federal claims. Long ago, this Court recognized "the importance, and even necessity of uniformity of decisions throughout the whole United States" on questions of federal law. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). A right of removal to federal court is "essential" to the "uniform and consistent application of national laws." *Tennessee v. Davis*, 100 U.S. 257, 266 (1880). More than a hundred years ago, this Court rightly held that "the founders of the Constitution could never have intended to leave to the possibly varying decisions of the State Courts what the laws of the government it established are [or] what rights they confer."

Id. Just so, Congress can never have intended to leave to the possibly varying decisions of tribal courts what rights and protections Price-Anderson provides in the event of a nuclear incident.

Authorizing tribal courts to adjudicate federal claims under Price-Anderson, as the Ninth Circuit did *sua sponte* in this case, interferes with Congress' objectives in making claims arising from a nuclear incident federal claims and in providing for the consolidation of all such claims arising from a single incident before a single federal court. Authorizing tribal courts to adjudicate those federal claims would promote disparity of procedure and even substantive law and would cause delay.[9]

C. Price-Anderson Preempts State-Law Claims Otherwise Arising From a Nuclear Incident and Necessarily Preempts Any Similar Tribal-Law Claims

By making any and all claims resulting from a nuclear incident federal claims, Price-Anderson preempts any state-law claims that may previously have existed. *Silkwood*, 464 U.S. at 248 ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307-08 (11th Cir. 1998) (state tort standards of care are preempted by federal regulatory standards in cases arising from nuclear incidents); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1552-53 (6th Cir. 1997) (claimant may sue for damages arising from a nuclear incident only under Price-Anderson; "the state law claims cannot stand as separate causes of action"); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994) (state cause of action for injuries arising from a nuclear incident is supplanted by the new federal cause of action); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) ("A claim growing out of any nuclear incident is compensable under the terms of the

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[9] See further discussion, *infra*, in Section II.

Amendments Act, or it is not compensable at all," because state causes of action for injuries arising from a nuclear incident no longer exist).

Because federal preemption is founded on the Supremacy Clause in the United States Constitution, preemption must apply *a fortiori* to tribal law. *See Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 154 (1980) (tribal sovereignty is "dependent on, and subordinate to, only the Federal Government"). *See also Strate*, 117 S. Ct. at 1416 (tribe's inherent sovereignty does not extend beyond "what is necessary to protect tribal self-government or to control internal relations").[10] As a result, there can be no tribal-law claims related to a nuclear incident for a tribal court to try. Indeed, a rule of law that prevented a federal court from taking charge of a case arising under federal law would deny "the conceded sovereignty of [the federal] government over a subject expressly committed to it." *Tennessee v. Davis*, 100 U.S. at 267.

Even where preemption is not complete (as it is here), state (or tribal) law is preempted to the extent it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248. A law permitting tribal courts to exercise jurisdiction over Price-Anderson claims would stand as an obstacle to Congress' purpose in amending Price-Anderson in 1988 because it would subject claimants outside the jurisdiction of the tribal court to different procedures and (as explained in more detail below) potentially different substantive law than claimants within the tribal court's jurisdiction. It would also frustrate Congress' clearly expressed

[10] In *Strate*, the Court held that "[o]pening the Tribal Court" for the "optional use" of an Indian plaintiff was "not necessary to protect tribal self-government," and that requiring the non-Indian defendants to defend in "an unfamiliar court" was "not crucial to protect the political integrity, the economic security or the health or welfare" of the tribe. 117 S. Ct. at 1416.

intent to permit defendants to have Price-Anderson claims decided in a federal court.

II. THE FEDERAL REMEDIAL SCHEME IS INCOMPATIBLE WITH TRIBAL COURT ADJUDICATION

The tribal courts are a relatively recent development in the history of the Indian tribes. Although the tribes have always had their traditional dispute resolution mechanisms, formalized court systems were not introduced until the late Nineteenth Century.[11] In 1883, the Secretary of the Interior authorized the establishment of Courts of Indian Offenses ("CIOs"), which were staffed by Indian judges but operated under the control of the Interior Department. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS 61-64 (1995); DELORIA & LYTLE 114-15. At its zenith, the CIO court system was in operation in approximately two-thirds of the reservations across the country. These courts came to be known as "CFR Courts" because the Bureau of Indian Affairs promulgated regulations governing proceedings in the courts. 25 C.F.R. Part 11 (1998).

[11] There were notable exceptions. The Cherokee Nation has long had a formalized system of government, including a Supreme Court that antedated the Supreme Court of Georgia by 20 years. Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law*, 80 MARQ. L. REV. 531, 549 n.88 (1997). *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 6 (1831) (describing Cherokee government institutions, including "a code of laws, civil and criminal" and "courts to expound and apply those laws.") For the most part, however, the tribes relied on informal means to enforce their societal norms, such as mediation by tribe leaders, tribal meetings to develop a consensus, peer pressure and ostracism. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978) (disputes usually "handled by social and religious pressure and not by formal judicial processes"); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE, 111-13 (1983) (hereafter "DELORIA & LYTLE"); Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 994-97 (1991); Blake A. Watson, *supra*, 80 MARQ. L. REV. at 547-49.

The courts have jurisdiction over civil actions against Indians arising in Indian country; jurisdiction lies against non-Indians only by consent. 25 C.F.R. § 11.103 (1998).

In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984, which was intended to encourage Indian self-governance and provided for the adoption of tribal constitutions and by-laws. 25 U.S.C. § 476. Since then, many tribes have developed their own judicial systems in place of the old CIO/CFR courts. The number of tribal courts has grown rapidly in recent years.[12] It is important to keep in mind, however, that the mining activities at issue in this case took place in the 1950s and 1960s. The legal landscape was different then. The CIO/CFR courts were dominant. It is doubtful that the mining companies had any reason to believe that they were subjecting themselves to tribal court jurisdiction by undertaking the uranium mining activities that gave rise to these claims 30-40 years later. As noted above, the CIO/CFR courts could assert jurisdiction over non-Indians only by consent. Similarly, a leading treatise stated the general rule to be that, for accidents occurring on the reservation, "tribal court jurisdiction in civil cases is invoked only when the *defendant* is a member of the tribe" in the absence of a contrary "stipulation by the parties." DELORIA & LYTLE 210 (emphasis in original). Professor (now Judge) Canby stated flatly that in a reservation-based civil case, if "the Indian wishes to sue the non-Indian in a tribal court, he cannot do it." William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 220. In addition, it appears that the Navajo Tribal Courts did not begin asserting general civil jurisdiction over nonmembers as defendants until the Tribal Code was amended in 1980. *See UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046, 1049 &

[12] *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. REV. 225, 232-33 & n.23 (1994) (describing rapid growth of tribal court system from 1978 to 1993).

nn.6-7 (D. Ariz. 1981).[13] Under these circumstances, it would disrupt settled expectations to require mining companies like the petitioners to defend in tribal court.

The implications of the Ninth Circuit's decision are equally disturbing in today's legal landscape. There are now more than 150 different tribal courts in operation, as well as 13 remaining CIO/CFR courts.[14] The tribal court systems vary widely in structure, procedure and philosophy. Some tribes, such as the Pueblos and Alaskan native villages, follow traditional procedures in which a tribal leader resolves disputes informally according to customary laws.[15] Other tribes, such as the Navajo, have a well-established court system with a large case load. *See* Gloria Valencia-Weber, *supra* n.12, at 233 n.22.[16]

[13] The only exception before that amendment was apparently a narrow one based on a Navajo Tribal Council resolution allowing jurisdiction over forcible entry and detainer actions. *See* William C. Canby, *supra*, at 223. That exception was not established until 1972, after the mining activities at issue here had been terminated. *Id.*

[14] *See* 25 C.F.R. § 11.100(a) (1998) (listing CIO courts); BUREAU OF INDIAN AFFAIRS, NATIVE AMERICAN TRIBAL COURT PROFILES (1985) (hereafter "TRIBAL COURT PROFILES"); B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity*, 24 WM. MITCHELL L. REV. 457, 475-76 (1998).

[15] *See* TRIBAL COURT PROFILES 71, 77, 79, 82, 84, 88, 90, 91, 95; DELORIA & LYTLE 112-13 (describing traditional court system); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 48 AM. J. COMP. L. 287, 301-02 & n.52 (1998) (describing various types of Pueblo courts); Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 712 (1997) (discussing secrecy of the traditional Iroquois and Pueblo dispute resolution process); Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 139-41 (1995) (describing evolution of tribal court processes).

[16] For a discussion by the Navajo Chief Justice of Navajo judicial philosophy and traditional methods of adjudication, *see* James

Most courts fall somewhere in between the extremes. *See generally* Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987).

The Ninth Circuit's decision suggests that any of the 170 tribal courts is entitled to decide for itself whether it has jurisdiction to hear Price-Anderson claims in the event of a nuclear incident, and then to decide those claims on the merits if it concludes that it has jurisdiction. The Ninth Circuit's analysis is generally applicable and could be cited as a basis for jurisdiction in any tribal court, no matter how well-equipped to handle complex, technical cases.[17] It is also possible that several different tribal courts would have jurisdiction over claims arising out of the same nuclear incident. For example, the Palo Verde nuclear plant in Arizona and the San Onofre nuclear plant in Southern California are surrounded by different tribes. In the event of a nuclear incident, two or more tribal courts might assert jurisdiction over claims arising out of the incident.[18] There would be no method for transferring or consolidating the cases in a single forum—a problem that could be easily solved in the federal courts under 42 U.S.C. § 2210(n)(2), or even under the general federal statutes. *See* 28 U.S.C. §§ 1404,

W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997).

[17] *See* Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 568-89 (1997) (describing variation in tribal courts and suitability for adjudication). There is a wide variety in the tribal courts' resources and sophistication, and in the legal training of the tribal judges. *See* TRIBAL COURT PROFILES; Gloria Valencia-Weber, *supra* n.12, at 240-41. The Navajo tribal court judges, for example, are not required to have any formal education beyond high school. *See* 7 Navajo Nation Code § 354(c).

[18] The surrounding tribes presumably would argue that their courts have jurisdiction because the incident had a "direct effect" on the "economic security . . . health [and] welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981).

1407. Allowing multiple claims to go forward in different tribal courts would result in delay, increased costs and the real possibility of inconsistent results. This would clearly undermine the congressional policy of ensuring that all liability arising out of a nuclear incident can be determined quickly and efficiently in one case by a single decision-maker.

If the Ninth Circuit is correct, those allegedly responsible for a nuclear incident would be forced to defend Price-Anderson claims in each tribal court where they are sued. The defendant might attempt to remove the cases from the tribal courts to federal court, but that strategy is likely to fail. The general removal statute on its face applies only to civil actions "brought in a State court." 28 U.S.C. § 1441(a). The courts that have considered the matter have generally held that the statute means what it says and that a tribal court is not a "State court." For example, in *Becenti v. Vigil*, 902 F.2d 777, 780-81 (10th Cir. 1990), the Tenth Circuit held that removal was improper, observing that "Congress has not yet seen fit to incorporate tribal court actions such as the one involved here in its grant of removal jurisdiction to the federal district courts."[19] The Price-Anderson removal provision, 42 U.S.C. § 2210(n)(2), likewise applies only to actions "pending in any State court." Thus, there is no statutory basis to remove Price-Anderson claims from the tribal courts.

With no means of removing the cases to federal court, the defendants would be forced to defend in the tribal courts. There is no guarantee that the tribal courts all

[19] *Accord Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1505 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998); *DeCoteau v. Sentry Ins. Co.*, 915 F. Supp. 155 (D.N.D. 1996); *Weso v. Menominee Indian School Dist.*, 915 F. Supp. 73 (E.D. Wis. 1995). *But see United States v. Tsosie*, 92 F.3d 1037, 1040 (10th Cir. 1996), in which the case apparently had been removed from tribal court without objection. The propriety of removal was not discussed.

would interpret and apply the Price-Anderson Act in the same manner. Indeed, there is no guarantee that the courts would even attempt to apply federal law to the Price-Anderson claims. Tribal-court legal systems do not invariably give precedence to federal law. For example, section 2-111 of the Code of the Winnebago Tribe specifies the hierarchy of laws to be applied in civil actions:

> 1. In all civil actions the tribal court shall apply:
>
> A. The constitution, statutes and common law of the tribe not prohibited by applicable federal law, and if none, then
>
> B. The federal law, including federal common law, and if none, then
>
> C. The laws of any state or other jurisdiction which the courts find to be compatible with the public policy and needs of the tribe.
>
> 2. No federal or state law shall be applied to a civil action pursuant to paragraphs (B) and (C) of subsection (1) of this section if such law is inconsistent with the laws of the tribe or the public policy of the tribe.

See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 301 (1998) (quoting and discussing § 2-111). A Winnebago tribal court hearing claims arising out of a nuclear incident could conclude, relying on section 2-111, that tribal law takes precedence over federal cases interpreting the Price-Anderson Act, or even over the provisions of the Act itself.

The Colville Tribe likewise treats its laws as having supremacy over federal law. Section 4.1.11 of the Colville Tribal Code provides: "In all cases the court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law,

state common law, federal statutes, federal common law and international law." *See* Michael Taylor, *supra*, 10 U. PUGET SOUND L. REV. at 241 n.45 (quoting § 4.1.11). The Sitka tribal courts apply the codes of the Tribe, supplemented by the tribe's customary law. The courts are permitted to refer to federal and state law for "guidance." *See* GloriaValencia-Weber, *supra* n.12, at 253.[20]

These examples simply illustrate that the tribal courts are not likely to apply federal regulatory schemes with the same fidelity and consistency as the federal courts. This is understandable, as each tribe enjoys many of the attributes of an independent, sovereign nation. And the tribal courts undoubtedly have unique competence in applying tribal law to cases within their jurisdiction. But Price-Anderson requires application of federal law, which in turn borrows state law for some issues. The tribal courts have no traditional role or special expertise in applying federal and state law. In implementing a federal statute such as Price-Anderson, it is critical to have predictable, uniform enforcement subject to ultimate review in this Court. Long ago, the Court recognized that in order to achieve "uniformity of decisions throughout

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[20] *See also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 733 (1989) ("tribal courts may not always follow federal law."). Another potential problem with tribal court adjudication is that the court's judgment may not be given full faith and credit in state and federal courts. *See* 28 U.S.C. § 1738 (full faith and credit due to courts of any "State, Territory or Possession"); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (tribal court judgments not entitled to full faith and credit; enforceable only as a matter of comity), *cert. denied*, 118 S. Ct. 1516 (1998); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 897-921 (1990) (discussing applicability of full faith and credit to tribal court judgments); Robert Laurence, *Full Faith and Credit in Tribal Courts*, 28 N.M.L. REV. 19 (1998) (same). Nationwide enforceability of a judgment is particularly important in implementing a broad federal scheme like the Price-Anderson Act.

the whole United States" on questions of federal law, lower courts must be subject to the control of a single "revising authority" empowered to control any "jarring and discordant judgments, and harmonize them into uniformity." *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 347-48.

The decision below is at odds with these principles in that it divests the federal courts of jurisdiction over claims arising out of a federal statute that preempts the field it occupies. Worse yet, the Ninth Circuit's decision vests jurisdiction in a court system from which there may be no effective recourse. If this case had been filed in state court, petitioners could have ensured a federal forum by removal at the outset of the case or by a certiorari petition to this Court at the conclusion of the state-court proceedings. When a case is filed in tribal court, however, there is no comparable right of recourse to the federal court system. Cases cannot be removed from a tribal court, as discussed above. And there is substantial doubt as to whether tribal-court decisions may be reviewed on the merits in federal court. The federal courts are clearly authorized to review tribal-court decisions determining the jurisdiction of the tribal courts. *See, e.g., Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990). In some cases, the jurisdictional determination is closely related to the merits. *See, e.g., Enlow v. Moore*, 134 F.3d 993 (10th Cir. 1998) (location of boundary line resolved both jurisdiction and merits). But in principle, the federal courts appear to be limiting their review to the tribal court's jurisdictional determination. *See Enlow*, 134 F.3d at 995 n.3.

If the tribal court does have jurisdiction, there is no obvious means by which its decision could be "appealed" or reviewed on the merits in federal court. This Court has

stated, although perhaps in dicta, that once it is determined that the tribal court has jurisdiction, "proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) (implicitly recognizing the absence of any general right to appeal tribal-court decisions to federal courts). There is no apparent statutory basis on which federal courts could review the merits of tribal-court decisions. *See Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1302 (8th Cir. 1994) (Loken, J., concurring); *LaBeau v. Dakota*, 815 F. Supp. 1074, 1076 (W.D. Mich. 1993). Nor would such review lie within this Court's certiorari jurisdiction. *See* 28 U.S.C. § 1257. It could be argued that federal courts have the inherent right to review any tribal-court decision construing a federal statute or deciding a federal question. *Cf. Arizona Public Serv. Co. v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1995) (federal courts are "the final arbiters of federal law"). But that principle has yet to be clearly established. Thus, a tribal court decision misinterpreting—or refusing to apply—the Price-Anderson Act might be effectively immune from review and correction in the federal courts.[21]

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[21] In enacting the Indian Tribal Justice Act, Pub. L. No. 103-176, 25 U.S.C. § 3601 et seq., Congress considered but rejected a provision in the Senate bill that would have required a study of tribal jurisdiction over federal laws. The Conference Committee concluded that "any examination of the possibility of Federal court review of tribal court decisions" would be premature at that time. H. CONF. REP. No. 103-383, at 13, *reprinted in* 1993 U.S.C.C.A.N. 2453, 2457. *See also* Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual*, 78 MINN. L. REV. 259, 295-305 (1993) (discussing reviewability of tribal-court decisions); Laurie Reynolds, *"Jurisdiction" in Federal Indian Law*, 27 N.M.L. REV. 359, 383-86 (1997) (same).

Amicus does not mean to suggest that the tribal courts are generally incompetent or unreliable. On the contrary, they perform an important function that has been clearly recognized by Congress and the Executive Branch.[22] But the proper role of the tribal courts does not extend to federal legislative schemes of national significance, especially where Congress intended to guarantee a federal forum to adjudicate all claims. Interpreting and applying federal statutes is the primary business of the federal courts. Indian tribal courts can claim no special interest or expertise in administering Price-Anderson or other comparable federal statutes.[23] Nor is jurisdiction over Price-Anderson claims "necessary to protect tribal self-government or to control internal relations." *Strate*, 117 S. Ct. at 1416 (quoting *Montana*, 450 U.S. at 564). The importance of assuring a federal forum for Price-Anderson claims outweighs whatever benefit may be derived from allowing the tribal courts to adjudicate those claims.

The Ninth Circuit's decision in this case is at odds with the congressional purpose of assuring a federal forum to resolve all claims arising out of a nuclear incident. The decision is particularly troublesome because it sets a precedent that is not necessarily limited to Price-Anderson and could be applied to other federal statutes. For example, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), is like Price-Anderson in that it establishes an elaborate federal remedial scheme enforceable in either state or federal court. *See Tafflin v.*

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[22] *See generally* Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113 (1995).

[23] *See* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C.L. REV. 1089, 1137-39 (1995) (questioning basis for tribal jurisdiction over federal questions); Brief *Amicus Curiae* for Montana and 13 other states in *Strate v. A-1 Contractors*, (U.S. No. 95-1872), at 21 (arguing that tribal courts lack jurisdiction over federal claims against nonmembers).

Levitt, 493 U.S. 455 (1990). Tribal members claiming to be the victims of racketeering activities by nonmembers might attempt to bring a RICO case against the nonmembers in tribal court. Under the Ninth Circuit's rationale, the tribal court would have jurisdiction to adjudicate the RICO claims. The defendant would have no right to remove, and it would be difficult or impossible to obtain federal court review of the merits of the final judgment.

Other federal statutes could be cited as additional examples of the mischief that the Ninth Circuit's decision may work.[24] So long as the tribal courts remain outside the federal system and potentially insulated from federal court review (including ultimate review in this Court), the tribal courts should not adjudicate federal claims under federal statutes.

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[24] The state courts have been found to have concurrent jurisdiction to hear claims under many different federal statutes. *See, e.g., Yellow Freight Systems, Inc. v. Donnelly*, 494 U.S. 820 (1990) (Title VII of the Civil Rights Act of 1964); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (civil rights actions under 42 U.S.C. § 1983); *Hapgood v. City of Warren*, 127 F.3d 490, 494 (6th Cir. 1997) (Americans with Disabilities Act); *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 84 F.3d 1388, 1394 (11th Cir. 1996) (Lanham Act); *Lane v. Central Bank of Alabama, N.A.*, 756 F.2d 814 (11th Cir. 1985) (Bank Holding Company Act). *See generally Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (state courts presumed to enjoy concurrent jurisdiction over federal statutes).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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